SUNGEI WAY LEASING SDN. BHD.

v.

KIM LEONG TIMBER SDN. BHD. & ORS.

HIGH COURT BORNEO
CHONG SIEW FAI J
[SUIT NO. 33 OF 1985]
6 SEPTEMBER 1989

CIVIL PROCEDURE: *Application for stay of execution pending the outcome of a trial to set aside consent judgment - Whether consent judgment obtained by negligence, fraud, mutual mistake - Whether special circumstances exist to allow stay.*

This is an application by 6 defendants for stay of execution by the plaintiff on the consent judgment entered against them on 29 July 1985 pending the outcome of the trial of the suit no. 64 of 1986 brought by the 6 defendants against Sungei Way to set aside the said consent judgment.

The ground for this application are that the said consent judgment was obtained by negligence, fraud; alternatively by negligent or fraudulent inducement on the part of Sungei Way, its servants or agents, by the mutual mistake on the part of Sungei Way and the defendants in action.

On 8 April 1985, Sungei Way instituted an action claiming RM2,306,108.70, interest and costs being the amount due and payable of agreed rentals under 6 lease agreements relating to the leasing of Caterpillar tractors, logging trucks and other equipments. The limited company was sued as the lessee and the 5 applicants were sued as the guarantors under two letters of guarantee. A joint defence of all the 6 defendants was filed by their solicitors. Sungei Way applied to strike out the defence and at the hearing of the application on 29 July 1985 a consent judgment was entered against the 6 defendants.

Evidence was adduced to indicate that before 19 January 1985, the defendants had informed their solicitors that the parties had agreed to settle the action and that as a step towards settlement, the defendants should submit to judgment first so that other terms could be worked out subsequently. The defendants and the plaintiff had agreed to settlement subject to certain mutual arrangement to be effected thereon.

However the defendants contended that they were given the impression that the entry of the judgment was a mere formality and that they expected that that would enable the first defendant-company Kim Leong Timber Sdn. Bhd. to pay up the judgment sum. They also contended that they did not appreciate that by submitting to judgment it involved judgment being entered against them personally. They also contended that there was a distinction between “submit to judgment” and allowing judgment to be entered in terms as in this action.

Held:

[1] The evidence shows that the parties (plaintiff and defendants) had agreed to settle the action, and that the defendants wished to have the defence withdrawn and to have judgment entered.

[2] It might be true that the applicants expected the 1st defendant-company being the principal debtor to settle the claim but on their own admissions, arrangements had to be made to settle the plaintiff's claim. Therefore the liability of the applicants to pay is not totally excluded.

[3] The forms and methods of compromise or settlement may, among others, be (1) an agreement to enter judgment by consent, (2) an agreement for the defendant to submit to judgment. In the instant case the plaintiff and the defendant had not only agreed to submit to judgment but also to have the consent judgment entered. On the applicant's own letter they wished to withdraw the defence and to submit to judgment.

[4] A stay of execution of a judgment for payment of money will not ordinarily be granted simply on the ground that the defendants/applicants have brought an action to set aside judgment, at any rate in the absence of circumstances rendering it inexpedient to enforce the judgment, though the bringing of the action is, of course, a factor to be considered together with other relevant facts and circumstances that are properly placed before the Court.

[5] The applicants had failed to show that the grounds for this application i.e., negligence, fraud, negligent or fraudulent inducement or mutual mistake exist. The applicant had also failed to show that there are special circumstances rendering it inexpedient to enforce the judgment. The plaintiff has properly obtained a judgment and should not be deprived of the fruit of his litigation except for good reason.

[Application is dismissed with costs.]

Case referred to:
Ferdinand Wagner v. Laubscher Brothers [1970] 2 All ER 174

For the 2nd, 3rd, 4th, 5th, & 6th defendants/appellants - M. Ting Sing Chuan; M/s.Yong & Wong
For the plaintiff/respondent - Belinda Hii; M/s. Lau & Co.

JUDGMENT

Chong Siew Fai J:

This is an application by the 2nd, 3rd, 4th, 5th and 6th defendants (the applicants) for stay of execution by the plaintiff, Sungei Way Leasing Sdn. Bhd. (Sungei Way), on the consent judgment entered herein against them and the 1st defendant (limited company) on 29 July 1985 pending the outcome of the trial of the suit no. 64 of 1986 brought by the 6 defendants abovementioned against Sungei Way to set aside the said consent judgment or until further order.

The grounds for this application are that the said consent judgment was obtained:

(i) "by negligence, fraud; alternatively by negligent or fraudulent inducement on the part of" Sungei Way, its servants or agents;

(ii) "by mutual mistake on the part of" Sungei Way and the defendants in this action.

So far as are relevant, the facts of the case may be briefly stated as follows: On 8 April 1985 Sungei Way instituted this action claiming RM2,306,108.70, interest and costs being the amount due and payable because of default in the payment of agreed rentals

under 6 lease agreements relating to the leasing of Caterpillar tractors, logging trucks and other equipments. The limited company was sued as the lessee, and the 5 applicants in this applications were sued as the guarantors under 2 letters of guarantee.

A jointly defence of all the 6 defendants dated 22 April 1985 was filed by their then advocates Messrs. Teo & Company.

By a summons-in-chambers dated 12 June 1985, Sungei Way through its advocates, Messrs. Lau & Company, applied under O. 18 r. 19 to strike out the defence and for entry of judgment in the sum and interest as claimed. At the hearing of the application on 29 July 1985 in which both sides were represented by advocates, consent judgment was entered against all the 6 defendants in the sum claimed, interest and costs at RM300.

Subsequently, there was a change of advocates by the defendants.

On 13 September 1988 the appellants (i.e., 2nd, 3rd, 4th, 5th, and 6th defendants) through Messrs. Yong & Wong filed this application. Altogether there are 8 affidavits:

(1) Teo Chong Lee's affidavit affirmed on 5 September 1988.

(2) 2nd defendant Ho Boon Hong's affidavit affirmed on 9 September 1988 (Ho's 1st affidavit).

(3) How Pak Kong's affidavit made on 6 October 1988 containing 10 paragraphs (How's 1st affidavit).

(4) How Pak Kong's affidavit made on 6 October 1988 containing 8 paragraphs (How's 2nd affidavit).

(5) 6th defendant Wong Yuk Hung's affidavit made on 2 December 1988 (Wong's affidavit).

(6) 2nd defendant Ho Boon Hong's affidavit made on 2 December 1988 (Ho's 2nd affidavit).

(7) How Pak Kong's affidavit made on 16 December 1988 (How's 3rd affidavit).

(8) William Lau Kung Hui's affidavit made on 20 February 1989.

Affidavits (1), (2), (5) and (6) were filed on behalf of the 5 defendants/applicants and affidavits (3), (4), (7) and (8), on behalf of the plaintiff/respondent. The contents of affidavits (2) and (5) are substantially the same; so are affidavits (3) and (7).

Before going further, I would say at once that the 4th defendant Loi Teck Ee had not made any affidavit himself nor were any of the affidavits filed on behalf of the applicants made on his behalf. So far as concerning him, therefore, no affidavit was filed in support of his application.

I wish also to make clear that the opinions and comments I express in this judgment are based on the evidence and materials before me in this application and for the purpose of this application. They do not decide and must not be taken as adjudicating or intending to adjudicate the issues in the said suit no. 64 of 1986.

As stated earlier, one of the grounds of the application is that the judgment was obtained by the negligence or fraud or alternatively, by negligent or fraudulent inducement on the part of Sungei Way, its servants or agents. In the affidavits filed in support of the application, however, only How was alleged. Hence, it is necessary to examine the allegations made against How. This I propose to do shortly and also when dealing with submissions by Counsel.

For the applicants, it was submitted that the grounds of the application are contained, in substance, in Mr. Teo Chong Lee's affidavit. My attention was drawn to paras. 4, 5, 6, 7 and 8 particularly para. 5 thereof. Mr. Teo's legal firm Messrs. Teo & Company was then acting for all the defendants. Briefly, what Mr. Teo deposed in those 5 paragraphs were these:

(a) that a few days before 19 June 1985, the 2nd and 5th defendants and How Pak Kong (manager of the plaintiff, Sungei Way) told him in his office that "the parties had agreed to settle the action and that's a step towards settlement, the defendants should have submitted to judgment first so that other terms for the settlement could be worked out subsequently";

(b) that Mr. Teo told the defendants to write to his firm confirming their intention to submit to judgment;

(c) that subsequently he received a letter dated 19 June 1985 (Exh. TCL1) signed by the 5 defendants/applicants instructing his firm to submit to judgment; and

(d) that on or about 23 July 1985 his firm received a letter dated 16 July 1985 (Exh. TCL2) from Messrs. Lau & Co. (advocates for the plaintiff) in which there was a reconfirmation that the plaintiff and the defendants (to quote Mr. Teo's exact words) "had agreed to settlement subject to certain mutual arrangements to be effected thereon".

Now, pausing here, I would make some observations:

(1) The original of Exh. 'TCL2' is a letter from Messrs. Lau & Co. addressed to the Senior Assistant Registrar, High Court, Sibu with copies extended to, among others, Messrs. Teo & Co. So it would be more accurate to say that Messrs. Teo & Co. received a copy of that letter.

(2) So far as is relevant and concerning the Court Registry, Exh. 'TCL2' requested for an earlier date to hear the plaintiff's application instead of on the originally fixed date of 14 October 1985 on the ground that the defendants had agreed to submit to judgment.

(3) In interpreting the letter Exh. 'TCL2' from Messrs. Lau & Co., Mr. Teo said the plaintiff and the defendants in this action had agreed to settlement "subject to certain mutual arrangement to be effected thereon". (See para. 8 of Mr. Teo's affidavit). With respect, this, in my opinion, is not quite in consonance with Exh. 'TCL2'. What Messrs. Lau & Co. wrote in Exh. 'TCL2' was:

> This will enable our clients, the plaintiffs and the defendants to tie up and complete certain mutual arrangements which shall depend on the above judgment to be entered.

Reading the above passage, it appears clear, to my mind, that the "certain mutual arrangements", whatever those might be, would be dependent on the entry of the judgment.

Furthermore, in para. 5 of his affidavit Mr. Teo said that the 2nd and the 5th defendants informed him that the parties had agreed to settle the action out of Court and that as a step towards settlement, the defendants should have submitted to judgment first so that other terms for the settlement could be worked out subsequently. This finds support in para. 5 of Ho's 1st affidavit and para. 5 of Wong's affidavit (which was also made on behalf of the 3rd and 5th defendants) that the 2nd and the 5th defendants had sometime in mid-June 1985 informed Mr. Teo that they were "prepared to submit to judgment so as to give way to a settlement out of Court". It is clear that whatever the settlement might be, they were prepared to submit to judgment in order to pave way for the settlement.

It is not disputed that the letter dated 19 June 1985 Exh. 'TCL1' was from the 5 applicants to their then advocates Messrs. Teo & Co. The content of the letter is short and clear. It reads:

> M/s. Teo & Co. Advocates,
> No. 18, Kampung Nyabor Road,
> Sibu.
>
> Dear Sirs,
>
> Re: Suit No. 33 of 1985
> Sungei Way Leasing Sdn. Bhd.
>
> v.
>
> Kim Leong Sdn. Bhd. & Ors.
>
> We refer to the above.
>
> We hereby confirm our verbal conversation that we wish you to withdraw the defence that you have filed on our behalf and to submit to judgment accordingly.
>
> Kindly please contact M/s. Lau & Co. Advocates, Sibu.
>
> Yours faithfully,
> Kim Leong Timber Sdn. Bhd.
>
> Loi Teck Ee (signed) Ho Boon Hong (signed) Foong Hoi Too (signed) Ngui Ngee Tee (signed Wong Yuk Hung (signed)

Reading the above letter together with paras. 4, 5, 6, and 7 of Mr. Teo's affidavit, the instructions are abundantly clear i.e., that the parties (plaintiff and defendants) had agreed to settle the action, and that the defendants/applicants wished to have the defence withdrawn and to have judgment entered.

Paragraph 4 of Ho's 1st affidavit and of Wong's affidavit said that by the present action it was the first time that the applicants ever became involved in litigation. This was refuted by the respondent through How's 1st and 3rd affidavits in which How deposed, which I accept, that the applicants were previously involved in at least one suit, namely, Sibu High Court Suit No. 66 of 1984. This goes to the question of reliability of the deponents.

Counsel for the applicants referred to paras. 3 and 4 of Ho's 1st affidavit and submitted that the applicants expected the 1st defendant-company Kim Leong Timber Sdn. Bhd. to pay up the judgment-sum and that entry of the judgment would be a mere formality and that that would enable the 1st defendant-company to settle the claim. It might be true that the applicants expected the 1st defendant-company being the principal debtor to settle the claim but on their own admissions, arrangements had to be made to settle the plaintiff's claim. And, with respect, I am unable to accept that the two paragraphs of the said affidavit totally exclude the applicants' liability to pay. Paragraph 3 thereof said: "..., that **particularly** Kim Leong Timber Sdn. Bhd. would be permitted to settle the plaintiff's claim gradually. (Emphasis added).

In para. 5 of Ho's 1st affidavit, there is also admission of agreeing to submit to judgment "so as to give way to a settlement out of Court".

On the other hand, How by his 2nd affidavit denied that there had been fraudulent inducement or mistake and said the 2nd, 5th and 6th defendants conceded in his office that they had no defence to the action and admitted liability. In paras. 8 of Ho's 1st affidavit and of Wong's affidavit, they contended that it was subsequently when the plaintiff Sungei Way commenced execution proceedings against them that it became clear to them the submission to judgment involved themselves being held personally liable. But taking the representation of How, as alleged by the applicants themselves, How did not at any time say that by submission to judgment they (the applicants) would not be personally liable. In other words, even in the 2nd defendant's own allegation about How's representation, he did not allege How to have said that. On the evidence available, How's representations were merely that arrangements would be made to settle Sungei Way's claim without in any way spelling out the mode or manner of settlement.

I have no hesitation in rejecting the assertion of the applicants that they did not appreciate that by submitting to judgment it involved judgment being entered against them personally.

In para. 4 of Ho's 2nd affidavit made on behalf of the 3rd, 5th and 6th defendants, he referred to "an action" commenced by Sungei Way. He alleged "the practice" of the plaintiff in getting judgment against them. This he relied on two factors. First, he said they went to see William Lau of Lau & Co. advocates for the plaintiff who advised them that entering of judgment was a formality and they permitted judgment to be entered by default. Ho annexed Exh. 'D1'. It is clear from Exh. 'D1' and from William Lau's affidavit made on 20 February 1989 that all those matters related to civil suit no. 66 of 1984. As such, they are therefore irrelevant to the present suit. As to the allegation against William Lau, William Lau in his affidavit said, which I have no reason to disbelieve, that he told them to consult their own lawyer. Moreover, this related to suit no. 66 of 1984.

The other factor relied on is Exh. 'D1' in which Sungei Way said "the judgment will automatically lapse upon the up-dating of the account". Apart from the irrelevancy of Exh. 'D1' stated above, the element of judgment lapsing through up-dating of accounts is not, as conceded by Counsel for the applicants, a feature of the present case. I reject the allegation of "the plaintiff's practice in getting judgment" against the applicants as totally unfounded and devoid of any merit.

For the applicants, Counsel contended that there was a distinction between "submit to judgment" and allowing judgment to be entered in terms as in this action. It is, of course, true, as a matter of law, that in the compromise of an action, the forms and methods of compromise or settlements may, among others, be:

(1) an agreement to enter judgment by consent,

(2) an agreement for the defendant to submit to judgment.

Having considered the evidence and the materials available, I am convinced that in the instant case the parties to the action, i.e., the plaintiff and the defendants had not only agreed to submit to judgment but also to have the consent judgment entered. On the applicants' own letter Exh. 'TCL1' they wished to withdraw the defence and to submit to judgment. The sole claim in the statement of claim in this action was for the sum RM2,306,108.70, interest and costs. Moreover, when the consent judgment was entered at the hearing on 29 July 1985, Mr. Teo who was Counsel for the defendants and who had been instructed on the matter did not in any way express or indicate that that was not the judgment intended. And, it was not until April 1986 (some 9 months later) that fresh action was commenced claiming to set aside the consent judgment. Also, the allegations of the applicants (other than the 4th defendant who as stated earlier made no affidavit and on whose behalf no affidavit was made) that the consent judgment was entered as a result of the negligent, wilful or fraudulent misrepresentations of How Pak Kong were denied by How in his affidavits. Furthermore, in para. 4 of How's 2nd affidavit, How deposed that the 2nd, 5th and 6th defendants approached him in his office and admitted to him that they had no defence to the action and admitted liability. None of the 3 applicants specifically challenged by any of the defendants/applicants respecting the deposition in para. 7 of How's 2nd affidavit that after the consent judgment was entered, the applicants again went to him requesting the plaintiff, Sungei Way, to defer the execution on the judgment to which How agreed subject to certain conditions which were not fulfilled.

For the applicants, reference was made to para. 10 of Ho's 1st affidavit in that the intended lessee of the Caterpillar tractors, logging trucks and equipments was not the 1st defendant-company but one Grand Lumber Sdn. Bhd for which the applicants "were supposedly to be guarantors" and that the plaintiff, Sungei Way, had changed the lessee to the 1st defendant-company without their consent. (See also para. 10 of Wong's affidavit raising the same point). With respect, I reject the contention. The 1st defendant did not dispute that it had entered into the lease agreements. And, as submitted on behalf of the respondent which I accept, the applicants in para. 5 of the defence admitted the guarantee but only denied liability thereunder by denying default in payment or breach on the part of the 1st defendant.

Paragraph 5 of the defence reads:

> The 2nd, 3rd, 4th, 5th, and 6th defendants admit the guarantee referred to in para. 7 of the statement of claim, but say that the 1st defendant (the principal debtor) has not made default in the payment of the agreed rentals or has not committed the alleged breaches of contract with the plaintiffs and the 1st defendant promised to continue to pay the agreed rentals to the plaintiffs regularly and punctually, by reason whereof, the 2nd, 3rd, 4th, 5th and 6th defendants are under no liability to the plaintiffs under the said guarantee at this stage.

In this connection, I also find no merits in the contention of Counsel for the applicants that the said para. 5 was what he termed "limited admission". To my mind, the applicants, on the materials available, were clearly guarantors for the lease agreements entered between the plaintiff and the 1st defendant-company.

For the applicants it was also pointed out that they had instituted an action (suit no. 64 of 1986) seeking to set aside the consent judgment herein and that unless stay was granted it would be futile to proceed with the action. A stay of execution of a judgment for payment of money will not ordinarily be granted simply on the ground that the defendants/applicants have brought an action to set aside the judgment, at any rate not in the absence of special circumstances rendering it inexpedient to enforce the judgment, though the bringing of the action is, of course, a factor to be considered together with other relevant facts and circumstances that are properly placed before the Court. In *Ferdinand Wagner v. Laubscher Brothers* [1970] 2 All ER 174 the plaintiff a manufacturer in Germany on 5 October 1961 obtained a judgment against the defendants, its distributors in England for about 6,000 pounds. That judgment was subsequently confirmed by the higher Courts in Germany. In 1964, the defendants brought an action in England raising substantially the same issues. In August 1969, the German judgment was registered in England under the Foreign Judgments (Reciprocal Enforcement) Act 1933. The effect of such registration was that the German judgment was equivalent to and enforceable just as if it was an English judgment. The defendants applied and obtained a stay of execution on the judgment. However, on appeal to the Court of Appeal, the stay was removed. In his judgment Lord Denning said (p. 176):

> If the plaintiffs had obtained an English judgment, we should not, for one moment, grant a stay simply because the defendants had brought a cross-claim in another action against the plaintiffs.

I am aware that in our instant case the second action brought by the defendants/applicants was seeking to set aside the consent judgment whereas in *Ferdinand Wagner's* case the action was instituted to relitigate in England a number of issues all or almost all of which had been the subject of litigation in Germany. But the distinction, in my opinion, does not affect application of the principle. In other words, whether the action is to relitigate issues already decided or to set aside a consent judgment, the fact that such an action has been brought is, in itself, no ground for granting a stay of execution of the judgment, at any rate in the absence of special circumstances rendering it inexpedient to enforce the judgment.

It may be convenient to state here that in the course of her submission, Counsel for the respondent referred to principles relating to the grant of interlocutory injunction. The present application is for stay of execution on a judgment. In my opinion, different test and considerations apply.

I have considered the submissions by Counsel and the affidavits and materials available. My conclusion is that for the purpose of this application none of the grounds stated in the summons in chambers dated 13 September 1988 i.e., negligence, fraud, negligent or fraudulent inducement or mutual mistake has been shown, even *prima facie*, to exist. The applicants also fail to show that there are special circumstances rendering it inexpedient to enforce judgment, it being not their case that they are unable from any cause to pay the judgment sum (O. 47 r. 1(1)). On the

other hand, a plaintiff who has properly obtained a judgment ought, generally speaking, not be deprived of the fruit of his litigation except for good reason. On the evidence and materials available, I am not satisfied that this is a proper case justifying the exercise of the discretion of the Court to grant the relief as sought.

The application is dismissed with costs to be paid by the applicants (i.e., the 2nd, 3rd, 4th, 5th, and 6th defendants) to the respondent/plaintiff. In the absence of an agreement, such costs are to be taxed.

Also found at [1990] 1 CLJ 148